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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



MAR 21 2001

File: EAC-00-097-50446 Office: Vermont Service Center Date:

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(O)(i)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

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prevent clearly unwarranted
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FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Unit

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an art gallery. The beneficiary is in the fine arts as a painter. The petitioner seeks O-1 classification of the beneficiary, as an alien with extraordinary ability in the arts, in order to continue exhibiting his works in the United States for a period of one year.

The director denied the petition finding that the petitioner failed to demonstrate that a qualifying job offer had been extended to the beneficiary and failed to establish that the beneficiary satisfies the regulatory standards as an alien of extraordinary ability in the arts.

In a statement provided on the Form I-290B Notice of Appeal, counsel for the petitioner argued that the regulatory standard applies to the performing arts rather than the fine arts, that the beneficiary will exhibit at a number of galleries as is the usual practice in the field, and that substantial evidence was submitted to show that the beneficiary is one of the top artists in his home country. Counsel stated that a written brief would be submitted on or before July 19, 2000. As of this date, however, no brief has been received and the record will be considered complete as presently constituted.

Section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"), provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The beneficiary is described as a native and citizen of Georgia who last entered the United States as a B-2 visitor on May 30, 1999. His current immigration status was not explained.

The first issue raised by the director is whether the petitioner has tendered a qualifying offer of employment or shown that it is acting as the beneficiary's agent.

In this case, the petition was filed by an art gallery that is exhibiting the beneficiary's work. In a letter accompanying the petition, it was stated that the beneficiary will exhibit at that gallery and "to be present at various exhibits and sales of his paintings."

8 C.F.R. 214.2(o)(1)(i) provides O-1 classification to qualified aliens if petitioned for by an employer. The definition of

employment is not explicitly defined in this section of the regulations owing to the varying nature of work in the arts. 8 C.F.R. 214.2(o)(2)(ii) requires, in part, copies of any written contracts and an advisory opinion from an appropriate U.S. consulting entity to include any possible objection to employing the alien in the United States. In the absence of a written contract, the petitioner may submit a summary of the terms under which the alien will be employed including any itinerary of his events or activities. Id.

8 C.F.R. 214.2(o)(2)(ii)(E) provides that in cases where an alien is traditionally self-employed a United States agent may file the petition. The agent must provide the contractual agreement between the agent and the beneficiary which specifies the terms and conditions of employment. 8 C.F.R. 214.2(o)(2)(ii)(E)(1).

On appeal, counsel stated that the beneficiary will exhibit his work "at a number of different galleries" and will "take a percentage of any works sold."

The petitioner has not established that it will act as the employer of the beneficiary or as his agent. There is no evidence that the petitioner has executed a contract with the beneficiary. Nor did the petitioner submit a summary of terms of employment in the absence of a contract. Simply stating that an artist will exhibit at various galleries and accept a percentage of sales does not satisfy the petitioner's burden of proof.

If the petitioning gallery intends to act as the beneficiary's agent, then a written contract is required in this type of visa petition proceeding. An art gallery that merely files the visa petition on behalf of an alien artist, in the absence of a specific employer or agent relationship, is not qualifying. Therefore, the petitioner has failed to overcome the director's objection.

The next issue in this matter is whether the petitioner has established that the beneficiary is an alien of extraordinary ability in the arts within the meaning of this provision.

8 C.F.R. 214.2(o)(3)(ii) defines, in pertinent part:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

Extraordinary ability in the field of arts means a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well known in the field of arts.

8 C.F.R. 214.2(o)(3)(iv) states that in order to qualify as an alien of extraordinary ability, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

In this case, the petitioner submitted documentation that the beneficiary has achieved a degree of recognition in his native country and has exhibited his work at at least one gallery in the United States.

After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial. Here, there is no evidence that the beneficiary has received an award equivalent to those listed at 8 C.F.R. 214.2(o)(3)(iv)(A). Nor does the record show that the beneficiary meets at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iv)(B).

The fact that the beneficiary may be a successful artist exhibiting and selling his works is not sufficient to establish extraordinary ability. The record does not demonstrate that the beneficiary's current exhibit constitutes having a lead role in an institution with a distinguished reputation. However well recognized the petitioning gallery may be, the record does not show that it has a "distinguished" reputation evidenced by articles in trade journals etc. contemplated by the regulation.

In addition, there is no evidence that the beneficiary has had a leading role in exhibitions "which have a distinguished reputation as evidenced by critical reviews." The petitioner submitted, in part, letters from various gallery owners praising the beneficiary's work, two favorable reviews in Georgian newspapers, and favorable mention in a U.S. art magazine. However, the petitioner did not demonstrate reviews from distinguished art critics or evidence that the alien has a record of "major commercial or critically acclaimed successes." Furthermore, the record contains no indication of the beneficiary's earnings from his art and does not demonstrate that he has "commanded a high salary" from his art.

In sum, the record is not persuasive in showing that the beneficiary has received recognition for extraordinary ability evidenced by extensive documentation or that he seeks to enter the United States to continue work in the area of extraordinary ability as contemplated by the plain language of the statute. The record is not persuasive in establishing that the beneficiary has the necessary "high level of achievement" in the arts evidenced by a degree of skill and recognition "substantially above" that ordinarily encountered in the field that is required for O-1 classification.

For these reasons, it is concluded that the petitioner has failed to overcome the grounds for denial stated in the decision of the director. The denial of this petition is without prejudice to the

filing of a petition on behalf of the beneficiary for any other benefit for which he may be eligible.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.